Razi bin Amnin v Public Prosecutor

HIGH COURT (MUAR) — CRIMINAL APPEAL NO 42–06 OF 2006
AHMADI ASNAWI JC
28 SEPTEMBER 2009

Criminal Law — Penal Code — s 376 — Rape — Ingredients of offence — Whether evidence of seminal stains vital ingredient — Practical and common sense approach of court, need for

Criminal Procedure — Appeal — Fact, finding of — Whether appellate interference warranted

Criminal Procedure — Defence — Denial — Mere denial without other proof to dislodge prosecution's case — Whether court correct in rejecting such defence

Evidence — Adverse inference — Whether presumption arose — Whether any basis to invoke presumption under s 114(g) Evidence Act 1950 — Evidence Act 1950 s 114(g)

The appellant was convicted of rape in the sessions court and sentenced to 10 years imprisonment. He appealed to the High Court against conviction and sentence. On appeal, counsel complained, inter alia, of: (i) the trial judge's acceptance of PW1's (the victim's) testimony; (ii) the prosecution's failure to produce in court the results of a medical laboratory investigation into the presence of seminal stains — counsel submitted that the prosecution's failure to produce the results of such investigation clearly warranted the application of s 114(g) of the Evidence Act 1950 ('the Act'); and (iii) the trial court's finding that the defence was a mere denial.

Held, dismissing the appeal:

(1) It is the trial judge's business to appraise whether the witness appearing before him is a credible witness of truth and that the witness' testimony is worthy of acceptance. In the instant case, the sessions' court judge having seen and heard PW1, concluded she was a credible witness and accepted her testimony. He also found ample corroborative evidence through the testimonies of other witnesses whom he found to be truthful and credible. On the facts, the sessions' court judge was entirely correct to come to such conclusions. These were findings of facts with

which the High Court fully agreed. There was no plausible reason to depart from such findings (see paras 5–6).

(2) The courts should be practical and adopt the common sense principle when dealing with rape. The courts should not put the victims of such crimes under unnecessary innuendoes, ridicule and derision (see para 11).

(3) Not all cases of non-production or suppression of evidence would invite the application of s 114(g) of the Act. The said provision is restricted only to the non-production or suppression of material evidence relevant to the case. In the instant case, PW1 had given unchallenged testimony that there was no seminal ejaculation. She also denied having intercourse with PW12. Thus, the investigations into the medical stains assumed no importance at all. There was no basis at all to invoke s 114(g) of the Evidence Act against the prosecution (see paras 20–21). *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 (referred).

(4) In rape, the most vital ingredients are the identity of the offender and the sexual act itself, ie the fact of penetration however slight. Rape is complete without seminal ejaculation. Thus the presence of spermatozoa or seminal stains would only act as corroborative evidence. The absence of such stains is not fatal to the prosecution if there is other evidence sufficient to corroborate the commission of the offence (see para 22). *Sidek bin Ludan v Public Prosecutor* [1995] 3 MLJ 178 (referred).

(5) In the instant case, it was not wrong for the sessions' court judge to conclude that the appellant's defence was a mere denial and ought to be rejected. A mere denial without other proof to reasonably dislodge the prosecution's case was insufficient to earn an acquittal (see para 33). *DA Duncan v Public Prosecutor* [1980] 2 MLJ 195 (referred); *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324 (referred).

[Bahasa Malaysia summary

Perayu disabitkan atas tuduhan merogol di mahkamah sesyen dan dihukum penjara sepuluh tahun. Dia merayu ke Mahkamah Tinggi terhadap sabitan dan hukuman. Atas rayuan, peguam mengadu, antara lain, mengenai: (i) penerimaan oleh hakim perbicaraan, keterangan PW1 (mangsa); (ii) kegagalan pihak pendakwaan untuk mengemukakan keputusan pemeriksaan ujian makmal tentang kewujudan kesan air mani — peguam menghujah bahawa kegagalan pihak pendakwaan untuk mengemukakan keputusan pemeriksaan tersebut jelas mewajarkan pemakaian s 114(g) Akta Keterangan 1950 ('Akta'); dan (iii) penemuan hakim perbicaraan bahawa pembelaan hanyalah penafian semata-mata.

Diputuskan, menolak rayuan:

(1) Adalah tugas hakim perbicaraan untuk menilai sama ada saksi yang

hadir di hadapannya adalah saksi yang bercakap benar yang boleh dipercayai dan bahawa keterangan saksi tersebut adalah wajar diterima. Di dalam kes ini, hakim mahkamah sesyen yang telah melihat dan mendengar PW1, memutuskan bahawa dia adalah saksi yang boleh dipercayai dan menerima keterangannya. Beliau juga mendapati keterangan sokongan yang lebih dari mencukupi daripada keterangan saksi-saksi lain yang beliau dapati bercakap benar dan boleh dipercayai. Di atas fakta, hakim mahkamah sesyen adalah betul secara keseluruhannya dalam mencapai keputusan tersebut. Ini adalah penemuan fakta yang mana Mahkamah Tinggi setuju sepenuhnya. Tidak ada alasan yang munasabah untuk menyimpang daripada penemuan tersebut (lihat perenggan 5–6).

(2) Mahkamah-mahkamah sepatutnya bersifat praktikal dan menggunakan prinsip akali apabila berurusan dengan kejadian rogol. Mahkamah-mahkamah tidak patut menjadikan mangsa jenayah sebegitu sebagai bahan sindiran, cemuhan dan persendaan yang keterlaluan (lihat perenggan 11).

(3) Bukan semua kes ketidak pengemukaan atau penyekatan keterangan akan menyebabkan pemakaian s 114(g) Akta. Peruntukan tersebut hanya terhad kepada ketidak pengemukaan atau penyekatan keterangan yang material yang relevan kepada kes. Di dalam kes ini, PW1 telah memberikan keterangan yang tidak dicabar bahawa tidak ada pancutan mani. Dia juga menafikan bersetubuh dengan PW12. Oleh itu, pemeriksaan kesan perubatan tidak mempunyai kepentingan sama sekali. Tidak ada asas sama sekali untuk menggunakan s 114(g) Akta tersebut terhadap pihak pendakwaan (lihat perenggan 20–21). *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 (dirujuk).

(4) Dalam kes rogol, elemen yang paling penting adalah identiti pesalah dan kelakuan seks itu sendiri, iaitu fakta kemasukan (penetration) walaupun sedikit. Tindakan merogol adalah lengkap tanpa pancutan air mani. Oleh itu kehadiran spermatozoa atau kesan air mani hanya sebagai keterangan sokongan. Ketiadaan kesan sebegitu tidak menjejaskan kepada pihak pendakwaan jika terdapat keterangan lain yang mencukupi untuk menyokong perlakuan kesalahan tersebut (lihat perenggan 22). *Sidek bin Ludan v Public Prosecutor* [1995] 3 MLJ 178 (dirujuk).

(5) Di dalam kes ini, tidak salah bagi hakim mahkamah sesyen untuk memutuskan bahawa pembelaan perayu adalah penafian semata-mata dan perlu ditolak. Penafian semata-mata tanpa bukti lain untuk mematahkan kes pihak pendakwaan tidak mencukupi untuk mendapatkan pembebasan (lihat perenggan 33). *DA Duncan v Public Prosecutor* [1980] 2 MLJ 195 (dirujuk); *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324 (dirujuk).]

Notes

For a case on defence of denial, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) para 1711.

For cases on finding of fact, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 395–469.

For cases on s 376 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1693–1718.

For cases on whether presumption of adverse inference arose, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 230–233.

Cases referred to

DA Duncan v PP [1980] 2 MLJ 195, FC (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
PP v Ling Tee Huah [1982] 2 MLJ 324, HC (refd)
Sidek bin Ludan v PP [1995] 3 MLJ 178, HC (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Penal Code s 379

Lawrnee Gnanapragasam (Rahim & Lawrnee) for the appellant.
Azeezi Nordin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmadi Asnawi JC:

[1] The charge against the appellant before the Segamat Sessions Court was for an offence under s 379 of the Penal Code for raping PW1, a girl who was then 14 years and four months old. The offence was alleged to have been committed at about 5pm on 8 August 2002 at the parking lot of Hutan Bantang, Sungai Bantang, Bekok, Segamat. He was found guilty of the offence and was convicted of the same by the learned sessions judge and sentenced to ten years imprisonment from the date the sentence was pronounced. The appeal before me was both against the said conviction and sentence.

[2] The facts appears to be fairly straight forward. PW12 and the victim, PW1 had known each other well before the incident on 8 August 2002. On the day in question PW1 was at her friend's house, PW8. Later in the day PW12 together with the appellant, came over to PW8's house. They came in a car bearing registration No CAC 7260 driven by the appellant. PW1 joined them and left for a drink in town. However at about 5pm they ended up at the parking lot of Hutan Bantang, Bekok, recreation spot. The appellant was a complete stranger to PW1.

[3] Soon after, the appellant left the driver's seat and entered into the rear seat of the said car, where PW1 was seated. She was seated there through out the journey. The appellant then started touching, embracing and kissing PW1. There appears to have been no resistance at that point of time from PW1. It ended up in the appellant stripping off PW1's trousers and raping her. PW12 who was seated in the front seat next to the driver's seat through out the incident witnessed what took place at the rear seat of the car but was too shocked and terrified to intervene. So much for the facts of the case.

PENILE PENETRATION

[4] Now the appellant's main complaint appears to be the learned sessions judge's acceptance of PW1's testimony that there was indeed penile penetration of the appellant's private parts into PW1's private parts. The argument is grounded upon PW1's testimony that she did not see the appellant's private parts entering into her private parts. All that she said was that she felt something entering into her private parts followed by a searing pain thereat. At the same time, she did not notice where the appellant's hands were. It was thus submitted that PW1's evidence on this issue is presumptuous and that it could have been anything that could have had entered into her private parts. It was suggested that there was only finger penetration.

[5] It is trite that it is the business of the trial judge to assess and appraise the credibility of the witness appearing before him. It is for him to make a proper assessment of the witness upon the evidence given as tested against the whole of the evidence in its entirety and tested against all the probabilities of the case. To a certain extend he is aided by the demeanour of the said witness testifying before him. The witness's promptitude or hesitation in answering the questions, the mannerism in answering the questions, the reactions to the questions put, the tone of the voice, the stares and blink of the eyes, the overall intelligence, and a hosts of other minute body language were all said to have played a role in such appraisal. Having seen and heard the witness, the trial judge is the best person to make out the kind of witness testifying before him. It is therefore his primary business to appraise whether the witness is a credible witness of truth and that his/her testimony is worthy of acceptance without more.

[6] In this case before me, the learned sessions judge has seen and heard PW1. Having done so he concluded that PW1 is a credible witness and accepted her testimony that it was the appellants private parts that had entered into her private parts. He opined that there were ample corroborative evidence to support such findings of penile penetration from the testimonies of the doctors (PW2 and PW9) who examined PW1 and also PW12 who

A remained seated in the car through out the incident. He saw and heard these witnesses and found them to be truthful and credible witnesses whose testimonies could be relied upon. It would thus be wrong for me to judge otherwise in the absence of hard, compelling reasons to do so. On the facts, the learned sessions judge was entirely correct to come to such conclusion.
B These are findings of facts and I am in full agreement with his findings therein and I find no plausible reason to depart therefrom. He had considered every material aspect there is to be considered that leaves no room for interference.

C

[7] Now, going into the details. PW1 testified that after the initial, brief engagement, she was made to lie down at the rear seat of the car. Her legs were pinned down by the appellant's legs while her hands were held down by one of the appellant's hand. The appellant next used his other hand to open and pull down her trousers and panties. The appellant then opened his own
D trousers. She tried to resist the appellant's advances but failed.

[8] Next PW1 felt something entered into her private parts. She was very sure that something had entered into her private parts because of the searing
E pain that followed. She was in a lying down position with her legs up. The appellant was on top of her with his face directly in front of her face. She did not see the appellant's private parts entering into or was inside her private parts but was very certain that it was the appellant's private parts that had penetrated into her private parts and nothing else — see pp 15, 6, 17, 23 and
F 24 of the *rekod rayuan* ('RR'). She added that she has had no experience in sexual intercourse prior to the incident but knew exactly what sexual intercourse is all about and what it entails. She was crucified on this issue of penetration during her cross-examination but she was consistent in maintaining her position that it was the appellant's private parts that had
G penetrated into her private parts. There was no seminal ejaculation though.

[9] In my view, PW1 was just being truthful. Positional wise during the rape incident, obviously there can be no way for PW1 to be able to see the appellant's private parts penetrating into her private parts. She was lying
H down with her legs up and the appellant was on the top of her body with his face directly in front of her face. But she was able to strongly feel the appellant's private parts penetrating into her private parts. She was equally adamant that it was not the appellant's finger(s) that had penetrated into her private parts.

I

[10] Now, as far as sexual intercourse is concerned it is governed by nature. One need not be married to know what is inside and what is outside. Equally, there is no necessity of gaining experience for a woman to know whether the male's private parts or other foreign objects had entered into her private parts,

as nature would have taken its own course. As an analogy if one were to close his eyes and another were to put a piece of wood into his mouth, he would know instantly that a piece of wood was put into his mouth. Likewise if an iron rod or banana or finger or hot water or stone or sand was put into his mouth he would instantly recognised what was the object that was put into his mouth even though his eyes were tightly shut. Such was human instinct and nature.

[11] It thus behoves that the courts should be practical and adopt the common sense principle when dealing with crimes of this nature and not putting the victims of such crimes under unnecessary innuendoes, ridicule and derision. In this appeal before me, the learned sessions judge has seen and heard the testimony of PW1 himself. He concluded that PW1 was a credible and truthful witness and accepted her testimony that it was the appellant's private parts that had penetrated into her private parts and not any other foreign objects. This is a finding of fact by the learned sessions judge. I have scrutinised the totality of PW1's testimony and on the facts and evidence it was not wrong for the learned sessions judge to come to such a finding. Evidently the said finding is not perversed. I have no reason plausible enough to interfere with the said finding. Thus, the appellant's complaint in respect of the factum of appellant's private parts penetrating into the PW1's private parts is verily without basis.

CORROBORATIVE EVIDENCE

[12] Of course, the learned sessions judge did not rely solely on the evidence of PW1 to account for such finding. He also looked elsewhere to fortify his finding.

[13] PW2 was the medical officer, attached with Segamat Hospital who conducted the general physical examination on PW2. The relevant part of his findings on PW1's external genitalia were:

> bruise, inflammation and tenderness over posterior fourchette;
>
> fresh tear of hymen at 4, 7 and 11 o'clock position; and
>
> a nail mark at the right buttock closer to the posterior, at the inner aspect of the thigh.

[14] PW1 was later referred to the O & G specialist, PW9. PW9 confirmed the aforesaid findings by PW2. PW2's medical report on PW1 is exh P5 (pp 181 and 184 of the RR).

[15] PW9 confirmed that she was requested to do a gynecological examination on PW1 and was present during the said external and gynecological examination conducted by her medical officer Dr Kalavathi, DW3. She confirmed the findings as found by DW3. DW3's report is exh P6 (pp 182 and 184 of the RR). The findings in exh P6 are materially the same as in exh P5. PW9 confirmed that the hymen tear at 4, 7 and 11 o'clock position was a fresh tear less than 72 hours old. The bruise, tenderness and inflammation over the posterior fourchette was caused by attempts at penetration, more due to attempts by penile penetration. She also confirmed that prior to the examination, PW1 has no sexual activity and it was possible that the fresh hymen tear was due to penile penetration. It could also be due to penetration by other causes. But she was non-committal as to the exact cause of the said hymen tear. However, the learned sessions judge accepted that the fresh hymen tear was corroborative evidence of penile penetration. On the facts he was not in error in coming up with such finding.

WHOSE PRIVATE PARTS ENTERED INTO PW1'S PRIVATE PARTS

[16] There are ample authorities to suggest that the fresh tear suffered by PW1's hymen would suffice to corroborate PW1's testimony that there was penetration into her private parts. But whose private parts? This was the appellant's next ground of appeal. It was learned counsel's submission that both PW1 and PW12 conspired to fix the appellant with the crime and the said crime in fact was perpetrated by PW12. This was indeed a very serious accusation. However the appellant did not offer any reason as to why both PW1 and PW12 would want to fix him with such a crime with dire consequences. Nor was it ever suggested that both PW1 and PW12 had harboured an axe to grind against the appellant. All the more so when both the appellant and PW12 were friends. They came together to fetch PW1 in a car borrowed by PW12 from his brother, PW5. In fact the appellant was the one who was driving the car all over. Equally, PW1 knew the appellant barely hours before the incident. There is no reason for PW1 to concoct such evidence implicating the appellant for no apparent cause or causes. The appellant also did not challenge the testimonies of PW1 and PW12 that at the parking lot, he entered into the rear seat of the car to where PW1 was seated and started touching, embracing, kissing and later removing PW1's trousers and his own trousers. The appellant also did not challenge PW12's testimony that he was on top of PW1's body. Both the appellant and PW12 were assaulted by PW1's relatives over PW1's failure to return home that night but the appellant was the only one who admitted to PW1's parents and uncles that he had sex with PW1. During the said admission, the appellant's own parents were also present.

[17] For all the aforesaid reasons, I find that learned counsel's submission that it was PW12 who had sex with PW1 could not hold water. I will deal with PW12's evidence later.

[18] PW1's testimony was cogent and intact. She passed the crucial test of a severe cross-examination and her testimony that it was the appellant's private parts that penetrated into her private parts stands uncontroverted and was factually accepted by the learned sessions judge. The medical evidence as provided by PW2 and PW9 offered the best corroborative evidence of the factum of such penetration. In the event it was not wrong for the learned sessions judge to find that PW1's testimony in respect of the factum of penetration was amply corroborated by the medical evidence. The hymen tear was not occasioned by the act of any other person other than the appellant.

APPLICABILITY OF S 114(g) OF THE EVIDENCE ACT 1950

[19] Learned counsel further submitted that as a per medical report exh P5, wet smear from introitus, wet smear from fornix for spermatozoa, smear from posterior fornix and endocervix for microscopic and bacteriology, rectal swab for spermatozoa and full blood count, VDRL, HIV, screening, Hepatatis screening, blood grouping and rhesus factor, UFEME, UPT were taken for laboratory investigation. However the result of such investigation were not revealed in court. It was submitted that the result of the investigation is necessary to prove the presence of either the appellant's or PW12's spermatozoa inside PW1's vagina. The failure by the prosecution to produce the result of such investigation clearly warrants the court to involve s 114(g) of the Evidence Act 1950.

[20] I have perused through the notes of evidence of the proceedings in the court below. There is nothing to indicate that the aforesaid items were handed over to the investigating officer ('IO') of the case, PW1, by either PW2 or PW9. The IO also made no mention about receiving these items from the two doctors or from the said hospital. Upon query, the learned deputy public prosecutor (DPP) replied that the said items were not sent to the chemistry department for analysis. Would the non-production of these items and the non-investigation of the same by the relevant authorities proved fatal to the prosecution? I think not. It is trite that not all cases of non-production or suppression of evidence would invite s 114(g) of the said Act into play. The said provision is restricted only to the non-production or suppression of material evidence relevant to the case (see *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 at p 494 para B, C — left).

[21] The corollary is whether the said swabs and wet smears are material evidence relevant to prove the case. It is apparent that the main objective in taking the said swabs and wet smears was to trace the presence of spermatozoa either inside or outside PW1's vagina. But PW1 testified that there was no seminal ejaculation inside or outside her vagina by the appellant. This

A evidence was not challenged by the appellant. As regards to PW12, she categorically denied having sex with him. In such event the investigation of the said swabs and wet smears assumed no importance at all. Its relevancy is negated by the absence of seminal ejaculation and exclusion by PW1 that she had sex with PW12. Therefore there is no basis at all to invoke s 114(g) of
B the Evidence Act to operate adversely against the prosecution. The same reasoning would apply to the prosecution's failure to sent the said car where the rape took place to the chemistry department though the said car was seized by the police and the clothings of PW1, PW12 and the appellant which were not taken by the IO and sent to the chemistry department for
C analysis. These issues were also part of the stated grounds of appeal.

[22] What is a lot more material in sexual offences of this nature are the ingredients of the offence, the most vital being the identity of the offender and the sexual act itself, ie the factum of penetration of the male private parts
D into the female private parts. The testimony of PW1 very clearly adverted to the sexual act committed by the appellant. Obviously, the presence of spermatozoa inside PWl's private parts or presence of seminal stains at the rear seat of the car or on the clothings of PW1, PW12 and the appellant are not ingredients of the offence of rape. But penetration is. In fact even the
E slightest penetration is sufficient to constitute the offence of rape — See *Sidek bin Ludan v Public Prosecutor* [1995] 3 MLJ 178 at p 186. The offence is complete without seminal ejaculation. The presence of spermatozoa or seminal stains would only act as corroborative evidence. Its absence is not fatal to the prosecution if there are other evidence sufficient to corroborate
F the commission of the offence.

INVOLVEMENT OF PW12

[23] PW12 testified that during the incident he was seated at the front seat
G next to the driver's seat. At the parking lot, the appellant left the driver's seat and entered into the rear seat where PW1 was. Soon after both were engaged in some conversation. Then he saw the appellant kissing and embracing PW1. Next, he saw both of them lying down. The appellant was on top of
H PW1. He also saw the appellant removing his own trousers and PW1's trousers. Their shirts were intact. He saw and was certain that both of them were having sex though he did not see the appellant's private parts penetrating into PW1's private parts. The incident lasted about ten minutes or so. PW1 did not resist nor asked for help during the duration. Out of the ten minutes,
I he was watching them for about seven minutes. He denied having sex with PW1 though vigorously cross-examined on the issue. He did not intervene because he was too shocked and terrified with what he saw.

[24] It is apparent that PW12's evidence lends a lot of credence to PW1's evidence in respect of the fact that the appellant went to the rear seat and started kissing and embracing PW1, PW1 was lying down at the rear seat of the car, the appellant removed PW1's trousers and his own trousers and that the appellant's body was on the top of PW1's. PW12 went through a lengthy cross-examination but he remained unscathed. These part of PW12's testimony was not challenged by the appellant. What was asked at length was whether he saw the appellant's private parts entering into PW1's private parts to which he admitted that he did not see the same, though he was adamant that both of them were having sex as he saw it on TV. It is worthy to note that it was put to him that he was the one having sex with PW1 at a point when the appellant left the car to buy drinks elsewhere leaving both PW1 and PW12 behind in the car to which he denied. PW12 also denied having sex with PW1 when the appellant left the car somewhere along the road to look for petrol when the car went out of gas, again leaving both PW1 and PW12 behind in the car. These evidence were accepted by the learned sessions judge with his findings that it was the appellant who committed the offence. Having perused through the evidence of both PW1 and PW12, I have no reason to disagree with the said findings. PW1 exonerated PW12 of the crime altogether. There is thus nothing to connect PW12 with the commission of the offence. The conspiracy theory adverted to by the appellant has no basis on the facts and has been dealt with earlier.

ATTEMPTS OF PENETRATION

[25] The next ground of appeal alleges that the learned sessions judge erred in fact and in law when he failed to take into consideration PW9's testimony that what had really happened was an attempt of penetration. It was submitted that the hymen tear was due to attempt of penetration and not caused by penetration.

[26] However, on the evidence it is my view that, learned counsel's submission on this point is misconceived. The medical evidence clearly shows that there were two separate findings of (i) fresh hymen tear; and (ii) bruise, inflamation and tenderness over the posterior fourchette. All that was said by PW9 was that the bruise, inflammation and tenderness over the posterior fourchette was caused by attempt of penetration, consistent with attempt by penile penetration. The posterior fourchette is distinct from the hymen as illustrated at p 183 of the RR. The two injuries were at different localities altogether. It simply means that the injuries to the posterior fourchette was caused when attempts or during attempts to penetrate the vagina was made. PW9 did not say that the hymen tear was due to attempt at penetration. There was complete hymen tear and the complete hymen tear was due, in fact, to penetration. Again PW9 testified that the said hymen tear was

consistent with penile penetration. PW9 also qualified herself by saying it could also possibly be caused by insertion of fingers into the vagina. This of course is a general statement we hear very often enough from specialist. Thus we have to go back to PW1's testimony to gather what has penetrated into her vagina causing the said hymen tear. In this respect, PW1's testimony that the appellant's private parts had penetrated into her private parts was unequivocal. Hence in my view there was no error committed by the learned sessions judge in terms as submitted by learned counsel. I have no hesitation in dismissing this ground of appeal.

THE TISSUE PAPER

[27] PW1 testified that after the rape incident was over, she saw the appellant wiped something using a tissue paper. The tissue paper was then thrown away at the parking lot. This tissue paper was recovered by the IO at the parking lot after the appellant pointed the same to him. This tissue paper was sent to the chemistry department and the IO testified that the result of the test conducted by the chemist on the tissue paper was negative. There were no traces of spermatozoa on the tissue paper. The result is not unsurprising though as PW1 merely said that she saw the appellant using a tissue paper to wipe something. She did not say that the tissue paper was used to wipe out remains of seminal discharge on his person.

[28] However the ground of appeal in respect of this tissue paper by the appellant rested, it was submitted, upon the ruling by the learned sessions judge who ruled the recovery of the said tissue paper unfavorably against the appellant in spite of the clear evidence that there were no traces of seminal stains on the said tissue paper.

[29] Upon perusal of the grounds of judgment, it is again my view that learned counsel's submission on this issue is misconceived. All that was considered by the learned sessions judge is this '... Keterangan ini menyokong keterangan SP1 yang mengatakan bahawa selepas OKT merogolnya SP1 nampak OKT mengesat sesuatu dengan tisu ...' (p 168 of the RR, para 6.6). A careful reading of the said passage clearly indicates that it simply means that the recovery of the said tissue paper corroborated SP1's testimony that the appellant used a tissue paper to wipe something after the rape incident was over. The learned sessions judge did not rule that the recovery of the said tissue paper is corroboration of penile penetration into PW1's private parts as was submitted by learned counsel.

[30] In the event it is my view that this ground of appeal is again without any basis.

THE FINDINGS THAT THE APPELLANT'S DEFENCE IS A DEFENCE OF AFTERTHOUGHT

[31] This constitutes the appellant's next ground of appeal. The appellant took issue that the crux of his defence that it was PW12 and another person at the *kilang* (PW6) who had sexual intercourse with PW1 was found to have been an afterthought by the learned sessions judge. It was submitted that the said defence was put to both PW1 and PW12 during the cross-examination of the two witnesses — as seen at pp 35, 109, 110 and 111 of the RR. However none was put to PW6. It was thus submitted that the defence is not one of afterthought and that the learned sessions judge had failed to properly consider the same.

[32] Be that as it may, in my view the emphasis of the learned sessions judge leaned more to the findings that the defence posted was a mere denial. He tested the evidence of the appellant against the evidence of both PW1 and PW12 and at the end of the day accepted the evidence of PW1 and PW12 and found the defence to be a mere denial. He has seen and heard these witnesses and on the facts and evidence he was not wrong to come to such a conclusion.

[33] The learned sessions judge alluded to the fact that the appellant did not deny the major parts of the testimonies of PW1 and PW12. The appellant did not deny going into the rear seat of the car, did not deny touching, embracing, kissing and later removing PW1's trousers and his own trousers. The appellant also did not deny the testimonies of PW1 and P12 that he was on the top of PW1's body when both were naked from the waist down. The only part which he denied was inserting his private parts into PW1's private parts. On the strength of the testimonies of PW1 and PW12 which he had accepted, it was not wrong for the learned sessions judge to conclude that the defence of the appellant was a defence of mere denial and ought to be rejected. It is trite law that mere denial without other proof to reasonably dislodge the prosecution's case is insufficient to earn an acquittal — See *DA Duncan v Public Prosecutor* [1980] 2 MLJ 195; *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324. As regards to PW6, it was never suggested to PW6 that he had sex with PW1. Verily the learned sessions judge was right in rejecting such a defence. I am with him there.

[34] The learned sessions judge also considered the evidence of DW2. He found the evidence of DW2 to be irrelevant. I am also with him.

[35] The learned sessions judge also considered the evidence of DW3, Dr Kalavathi, who conducted the gynecological examination on PW1. She testified that PW1's hymen tear was a fresh tear, consistent with penile

penetration rather than finger penetration. The learned sessions judge opined that DW3's testimony merely fortified the prosecution's case. Again I am with him.

[36] For all the reasons given above I dismiss the appellant's appeal without more. His conviction by the court below is affirmed. There were no submissions upon the sentence imposed by either the defence or the prosecution. Hence the sentence imposed by the learned sessions judge is also affirmed.

Appeal dismissed.

Reported by Andrew Christopher Simon